85-163

No.

Office Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BALAIR, LTD., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Where it has been held that the United States violated an international treaty, and where other nations bound by the same international obligations interpret them to create private causes of action when violations occur, was it error to dismiss a private suit against the United States on the grounds that sovereign immunity bars such a suit unless explicitly waived by treaty language?

LIST OF PARTIES

Petitioners in this case are:

Balair, Ltd.
Deutsche Lufthansa Aktiengesellschaft
Iberia, Linea Aereas de Espana
Koninklijke Luchtvaart Maatschappij
N.V. (KLM Royal Dutch Airlines)
Scandinavia Airlines System
Swissair, Swiss Air Transport
Company, Ltd., and
Union de Transport Aeriens

No parents, subsidiaries or affiliate companies of any petitioner are publicly traded in the United States or are otherwise owned in any measure by United States citizens.

Respondents in this case are:

The United States of America
Donald D. Engen
Administrator
Federal Aviation Administration

Additional parties

The following parties were plaintiffs in the district court, appellants in the court of appeals, but have not joined in the petition for certiorari:

Finnair O.Y.
Linee Aeree Italiane (Alitalia)
Societe Anonyme Belge D'Exploitation
de la Navigation Aerienne (SABENA)

The following governments appeared as *amici curiae* in support of petitioners before the court of appeals:

The Government of Belgium
The Federal Republic of Germany
The Government of Spain
The Government of Switzerland

The following governments filed *notes verbale* in support of petitioners with the U.S. Department of State which were incorporated as appendices in the above-referenced *amici curiae* brief:

The Government of France
The Government of The Netherlands
The Government of Italy

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Balair, Ltd., Deutsche Lufthansa Aktiengesellschaft, Iberia, Linea Aereas de Espana, Koninklijke Luchtvaart Maatschappij N.V. (KLM Royal Dutch Airlines), Scandinavia Airlines System, Swissair, Swiss Air Transport Company, Ltd., and Union de Transports Aeriens (hereafter, the foreign air carriers) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

Neither the Judgment of the court of appeals, set forth in Appendix A, nor the Memorandum and Order of the district court, set forth in Appendix B, is reported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATORY ORDERS INVOLVED

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1350

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Federal Aviation Administration, Department of Transportation, "Special Federal Aviation Regulation No. 40; Operation of Model DC-10 Airplanes in the United States Prohibited" (SFAR-40), June 6, 1979, 44 Fed. Reg. 33396 (1979)

Section 1. Contrary provisions of Parts 91, 121 and 129 of the Federal Aviation Regulations notwithstanding, no person may land or takeoff any Model DC-10 airplane within the United States, except as authorized under § 2 or otherwise authorized by the Administrator.

Section 2. This regulation does not apply to a foreign registered Model DC-10 airplane which, at the time this regulation takes effect, is en route to a place in the United States or is at a place within the United States. These airplanes may depart from the airport at which they are located, or at which they arrive, for a place outside the United States, using the most direct, feasible route, and without passengers or cargo on board.

This Special Federal Aviation Regulation is effective until amended or terminated by the Administrator.

STATEMENT OF THE CASE

On May 25, 1979 American Airlines flight 191, a DC-10 series 10 aircraft, crashed shortly after takeoff at Chicago's O'Hare International Airport. After initial investigation the Administrator of the Federal Aviation Administration (hereafter, the FAA), on June 6, 1979 issued Special Federal Aviation Regulation No. 40 (hereafter, SFAR-40). SFAR-40 precluded the takeoff and landing within the United States of any DC-10 aircraft, regardless of series and regardless of country of registry.

Almost simultaneously the countries of registry for the foreign air carriers' DC-10 aircraft issued their own grounding orders. Unlike the FAA order, none of the other grounding orders purported to ground aircraft certificated by another sovereign nation. All DC-10 airworthiness certificates were reinstated by the governments of the foreign air carriers by June 21, 1979. SFAR-40 was not rescinded until July 13, 1979.

Shortly after SFAR-40 was issued two cases were filed in the United States Court of Appeals for the

District of Columbia Circuit challenging the legality of the scope of the FAA's grounding order. In *British Caledonian Airways Ltd.* v. *Bond,* and *Balair AG* v. *Bond,* 665 F.2d 1153 (D.C. Cir. 1981) (hereafter, *Balair I*), the court of appeals held that the FAA's issuance of SFAR-40 violated Article 33 of the Chicago Convention,[1] the relevant aviation bilateral agreements, and section 1102 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1502, insofar as it purported to bar aircraft duly certificated by other nations from U.S. airspace. 665 F.2d 1159-1168.

The foreign air carriers' complaint in the instant case seeks damages relating to the period after the relevant European governments had reinstated all DC-10 airworthiness certificates but before the United States finally rescinded the unlawful SFAR-40 order. Pursuant to Government motion, the district court dismissed the action under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the following grounds:

> Plaintiffs do not contend that the Agreements contain specific language waiving the government's sovereign immunity from suit for violations of their provisions; rather they assert that the Court must scrutinize the international regulatory scheme to determine whether a cause of action for damages is required by implication.
>
> We do not accept plaintiffs' assertion.

Appendix B, *infra,* pages 8a-9a.

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[1] The Convention on International Civil Aviation (The Chicago Convention), *opened for signature,* December 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, T.I.A.S. No. 1591 (ratified by the United States August 9, 1946).

A notice of appeal was filed on April 27, 1984. At the appellate level the governments of Belgium, Germany, Spain, Switzerland, France, The Netherlands and Italy all expressed the view, either as *amici curiae* or in *notes verbale* transmitted to the United States Department of State, that dismissal was improper and that suits such as the present one were intended to exist against any signatory nation that breached its international aviation obligations as defined in the relevant international compacts. The *amici curiae* brief and accompanying *notes verbale* also apprised the court of appeals that analogous causes of action would lie in European courts if European governments violated the treaty and bilateral agreement provisions at issue, and that no European government could avail itself of a defense such as governmental sovereign immunity to secure the dismissal of such a suit. On April 30, 1985, the court affirmed the district court's Memorandum and Order without opinion.

REASONS FOR GRANTING THE PETITION

Petitioners know of no other case raising the precise issue raised here, that is, whether the intended beneficiaries of self-executing treaties and international agreements may have a cause of action for damages resulting from an established violation by a signatory nation of its international covenants where "sovereign immunity" is not waived on the face of the treaty. All other nations that have expressed an opinion as to this issue have urged that a right to recover was intended to exist where the international obligations here involved are violated by any signatory. The case therefore raises important issues of international comity.

The failure of the trial court to utilize the principles set forth by this court in *Cort* v. *Ash,* 422 U.S. 66 (1975), to determine legislative intent concerning the issue of waiver of sovereign immunity, and the court of appeals' affirmance of that dismissal, were in error and in direct conflict with a decision of the Third Circuit in *Patentas* v. *United States,* 687 F.2d 707 (3rd Cir. 1982).

I. The Case Presents Important International Comity Issues Which Should Be Decided By This Court

The foreign air carriers have urged throughout this proceeding that a private cause of action exists in their favor under the relevant treaty and bilateral agreement provisions when a signatory nation breaches its international obligations. The governments of Belgium, Germany, Spain, Switzerland, France, The Netherlands and Italy all viewed this matter as important enough to compel them to present their views to the court of appeals either as *amici curiae* or in *notes verbale* communicated officially to the U.S. Department of State. All of the governments that have expressed a view have agreed with the foreign air carriers' contention that causes of action such as this were intended to be created under the international aviation regulatory regimen, were created, and bind the United States when it violates the law to the same extent that all other signatories would be bound when and if they violate the law.[2]

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[2] To this list can be added the United Kingdom as well, since it took the same position in an *amicus curiae* brief filed in *Balair I. See* Brief of the United Kingdom at page 12, D.C. Cir. Docket Nos. 79-1662 and 79-1737. The U.S. State Department has officially

The trial court's refusal on jurisdictional grounds to hear and decide the issues raised by the foreign air carriers and the respective European governments was error that requires this Court to assert jurisdiction.[3] If the review sought by this petition is not granted, a direct international conflict as to the correct interpretations to be given to the relevant treaty and bilateral agreement provisions will result since the interpretation of the United States government and the courts below is at odds with all other interpretations that have been expressed in this proceeding by other signatory nations. Such an international conflict should not be allowed to occur. As this Court has held, (1) a treaty "contemplates reciprocity with respect to . . . rights and privileges . . ." *Santovincenzo* v. *Egan,* 284 U.S. 30, 36 (1931), and (2) "the meaning given [to treaties] . . . by the departments of government charged with their negotiation and enforcement is [to be] given great weight . . ." *Kolovrat* v. *Oregon,* 366 U.S. 187, 194 (1961). The lower courts'

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remained silent during this proceeding and has not indicated its position concerning the intended meaning of the international agreements at issue.

[3] The lower court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) was clearly error. The district court had statutory authority to hear and to decide the allegations raised in the foreign air carriers' complaint pursuant to 28 U.S.C. §§ 1331 and 1350. This Court has repeatedly held that where there is such statutory authority and "the right . . . to recover under [a] complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another . . . the district court has jurisdiction." Bell v. Hood, 327 U.S. 678, 685 (1946). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963); Bock v. Perkins, 139 U.S. 628, 630 (1891).

disposition of the foreign air carriers' complaint accorded no weight to the views of other signatory nations and did so in a manner that defeats any goal of reciprocity with respect to rights and privileges.

This judicial abstention in the light of the international implications raised by the instant case provides ample cause for this Court to issue the requested writ.

II. The Issue of Whether *Cort* v. *Ash* Applies to Allegations Concerning Waivers of Sovereign Immunity Should Be Decided By This Court

The foreign air carriers urged below that judicial analysis under the test articulated by this Court in *Cort* v. *Ash, supra,* and its progeny would show that the U.S. government waived any sovereign immunity defense when it agreed as a signatory nation to be bound by the terms of the relevant treaty and international agreement provisions.[4] The lower court's failure to employ a *Cort* v. *Ash* analysis requires review by this Court since it diverges 180 degrees from the only other circuit court precedent on the issue of sov-

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[4] The first three prongs of the Cort v. Ash test are directly relevant in the treaty context:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff?

422 U.S. at 78. The fourth prong of Cort v. Ash, concerning whether the cause of action is in an area traditionally relegated to the states of the union, is of necessity satisfied in the treaty context.

ereign immunity, and since it ignores the importance of the issues underlying the theory of implied waiver of sovereign immunity in the international context.

This Court has held that the principles set forth in *Cort* v. *Ash* "present the relevant inquiries to pursue in answering the recurring question of implied causes of action." *California* v. *Sierra Club,* 451 U.S. 287, 293 (1981). *See also Chrysler Corp.* v. *Brown,* 441 U.S. 281, 316-17 (1979). The lower courts' failure to apply *Cort* v. *Ash* to questions concerning waiver of sovereign immunity was not only out of step with the teachings of this Court, but conflicted directly with the only other circuit court decision known to the foreign air carriers that has ever addressed the applicability of *Cort* v. *Ash* principles to the sovereign immunity issue. In that case, *Patentas* v. *United States,* 687 F.2d 707 (3rd Cir. 1982), the Third Circuit used a *Cort* v. *Ash* analysis to determine whether there was an implied waiver of sovereign immunity under the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1232. The courts' refusal to follow the *Patentas* holding here results in a conflict in circuits on the issue of the applicability of the *Cort* v. *Ash* criteria to the issue of legislative intent regarding sovereign immunity.

In point of fact, the present case presents an even more compelling basis for a *Cort* v. *Ash* analysis than did *Patentas. Patentas* raised issues of sovereign immunity waivers in the purely domestic context. By contrast, this case involves the implied waiver of sovereign immunity in an international context, where different governments have agreed, each under its own jurisprudential system, to be bound by the same inter-

national aviation rules. In that context the argument is stronger that waiver can be found even in the face of textual silence. This is, again, evidenced by the fact that every other nation that has been heard on the subject has indicated that the right to recover asserted by the foreign air carriers was intended to exist when the agreements at issue were entered into, irrespective of the fact that such a right was not explicitly provided for. Given this fact it is particularly egregious for this country, after violating its international obligations, to now claim that idiosyncracies of its own jurisprudence not only bar the assertion of such a right, but jurisdictionally bar its courts from even analyzing whether the right could have been intended to exist.

CONCLUSION

The foreign air carriers submit that for all of the foregoing reasons a writ of certiorari should issue.

Respectfully submitted,

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Scandinavia Airlines System
Swissair, Swiss Air Transport Company, Ltd. and
Union de Transports Aeriens

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 84-5285

Civil Action No. 83-03093

BALAIR LTD., a Foreign Corporation, *et al.*, Appellants

v.

UNITED STATES OF AMERICA, *et al.*

[United States Court of Appeals For the District of Columbia Circuit FILED APR 30 1985
George A. Fisher Clerk]

Appeal from the United States District Court
for the District of Columbia

Before WRIGHT, Circuit Judge, MARKEY,* Chief Judge, United States Court of Appeals for the Federal Circuit, and SCALIA, Circuit Judge.

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* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1982).

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The court has fully considered the issues presented; they occasion no need for an opinion. *See* D.C. Cir. R. 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum and Order filed March 1, 1984, *reproduced in* Joint Appendix at 29-35.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court from which this appeal was taken is hereby affirmed.

It is FURTHER ORDERED by this court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3093

BALAIR, LTD., *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants.

[Filed Mar 1 1984 Clerk, U.S. District Court
District of Columbia]

MEMORANDUM AND ORDER

The plaintiffs in this action are ten European air carriers who operate foreign-registered McDonnell Douglas DC-10 aircraft between airports in their respective countries and airports located in the United States. Defendants are the United States of America and J. Lynn Helms, Administrator of the Federal Aviation Administration (FAA).

The genesis of this action is the issuance by the FAA on June 6, 1979 of "Special Federal Aviation Regulation No. 40" (SFAR 40). Issued in the aftermath of the crash on May 25, 1979 of a United States registered DC-10 airplane upon take off from Chicago's O'Hare International Airport, SFAR 40 prohibited the operation within the airspace of the United States of all Model DC-10 airplanes, including those registered by foreign aviation authorities. SFAR 40 re-

mained in effect until its rescission by the FAA on July 13, 1979.

Prior to its rescission, the legality of SFAR 40 was challenged by several of the plaintiffs in suits brought before the Court of Appeals of the District of Columbia Circuit. These plaintiffs contended that in issuing SFAR 40 the Administrator of the FAA had violated the provisions of several international agreements (Agreements) to which their respective countries and the United States were parties as well as section 1102 of the Federal Aviation Act of 1958, 49 U.S.C. § 1502 (1976). The Court of Appeals ruled in favor of the plaintiffs and set aside the action of the FAA.[1] *British Caledonian Airways Ltd. v. Bond,* 665 F.2d 1153 (D.C. Cir. 1981).

The present action was brought by the plaintiffs solely to recover damages sustained as a result of the issuance of SFAR 40. Plaintiffs allege that SFAR 40 barred their DC-10 aircraft from transporting passengers and property into and out of the United States causing them damages in excess of $100,000,000. Plaintiffs base the jurisdiction of the Court upon 28 U.S.C. § 1331 (Supp. V 1981) and 28 U.S.C. § 1350 (1976).[2]

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[1] The order of the court setting aside the action of the FAA came after the rescission of SFAR 40 by the FAA. The Court rejected the government's argument that the suit had become moot stating that the plaintiffs had sought judicial review while SFAR 40 was still in effect and that there was a reasonable expectation that the plaintiffs would be subject to the same action again. *British Caledonian Airways,* 665 F.2d at 1158.

[2] Plaintiffs expressly disclaim reliance on either 28 U.S.C. § 1346 (a)(2) (Supp. V 1981), the Tucker Act, or 28 U.S.C. § 1346(b)

Before the Court is the motion of defendants to dismiss plaintiffs' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendants assert that money damages cannot be awarded in a suit against the United States absent a waiver of sovereign immunity. Defendants contend that neither the jurisdictional provisions relied upon by the plaintiffs nor the Agreements between the United States and the countries wherein the plaintiffs are located provide any basis for an award of money damages against the United States. Defendants claim this result is unaffected by the inclusion of the Administrator of the FAA as a defendant inasmuch as a suit for damages against the Administrator is, in effect, a suit against the United States. Plaintiffs oppose the motion.

For the reasons given below, defendants' motion to dismiss plaintiffs' complaint is granted.

We begin our analysis with a few general principles governing the doctrine of sovereign immunity. As the Supreme Court stated in *United States v. Sherwood,* 312 U.S. 584, 586 (1941), as a sovereign the United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Reaffirming that principle the Court in *United States v. Testan,* 424 U.S. 392, 399 (1976), noted that "except as Congress has consented to a cause of action against the United States, 'there is no

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(1976), the Federal Torts Claim Act, as bases for this Court's jurisdiction. *See,* Plaintiffs' Response In Opposition To Defendants' Motion To Dismiss at 2-3.

jurisdiction . . . to entertain suits against the United States.' " (Quoting *United States v. Sherwood,* 312 U.S. at 587-88 (1941).)

The Supreme Court has indicated that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed,' " *United States v. Mitchell,* 445 U.S. 535, 538 (1980), quoting *United States v. King,* 395 U.S. 1, 4 (1969), and that the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States,* 352 U.S. 270, 276 (1957). Thus, unless an express waiver of sovereign immunity to a suit for damages can be found in either 28 U.S.C. § 1331 or 1350 or the Agreements alluded to above, this Court does not have jurisdiction to entertain plaintiffs' suit.

The first jurisdictional provision relied upon by plaintiffs, 28 U.S.C. § 1331 (Supp. V 1981), provides district courts with jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." On its face section 1331 does not empower district courts to hear civil actions brought against the United States. Indeed, courts have consistently held that section 1331 does not waive the federal government's sovereign immunity to suit. *See, e.g., Beale v. Blount,* 461 F.2d 1133, 1138 (5th Cir. 1972); *Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir. 1981), *cert. denied,* 454 U.S. 1146 (1982); *B.K. Instrument, Inc. v. United States,* 715 F.2d 713, 724 (2d Cir. 1983). Unless the plaintiffs can point to another provision specifically waiving the government's sovereign immunity to suit for money damages, the Court does

not have jurisdiction under section 1331 to hear plaintiffs' claims.[3]

The second jurisdictional provision cited by plaintiffs is 28 U.S.C. § 1350 (1976). It states that the district courts will have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Like section 1331, this section does not contain an explicit waiver of the government's sovereign immunity. The issue of whether section 1350 permits district courts to hear suits for money damages against the United States based on alleged treaty violations was addressed by the Court of Appeals of the District of Columbia Circuit in *Canadian Transport Co. v. United States,* 663 F.2d 1081 (D.C. Cir. 1980). We find that case controlling.

In *Canadian Transport* the plaintiffs alleged, *inter alia,* that the Coast Guard's refusal to permit the entry of their ship into the port of Norfolk, Virginia violated treaty obligations of the United States. The plaintiffs argued that a suit for money damages against the United States was available under sec-

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[3] An example of a provision which may be used in conjunction with section 1331 to confer jurisdiction on district courts of suits against the United States is 5 U.S.C. § 702 (1982). That section, which is part of the Administrative Procedures Act, contains an explicit waiver of the government's immunity from suits "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority . . . ." Since plaintiffs' suit seeks money damages section 702 is unavailing. Plaintiffs have not identified any provision which waives the government's immunity from suits seeking money damages.

tion 1350. After reviewing section 1350, the Court of Appeals phrased the issue before it as follows:

> Because nothing in the language of this statute indicates that the United States has waived its sovereign immunity from tort suits for treaty violations, the District Court's decision dismissing this cause of action must be affirmed unless appellants can show another basis for concluding that sovereign immunity has been waived.

Id. at 1092.

The plaintiffs in *Canadian Transport* argued that the treaty itself was a waiver of sovereign immunity. Plaintiffs brought to the attention of the court general language in the treaty which granted their ships and cargo secure passage into ports and rivers in the United States. The court rejected plaintiffs' arguments stating:

> Nothing in the quoted language indicates that the United States has agreed to be held liable in damages if the treaty is violated. In the absence of specific language in the treaty waiving sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom.

Id.

The holding of *Canadian Transport* impels us to conclude that Section 1350 does not empower plaintiffs to maintain their suit in this Court for money damages against the United States. Plaintiffs do not contend that the Agreements contain specific language

waiving the government's sovereign immunity from suit for violations of their provisions; rather they assert that the Court must scrutinize the international aviation regulatory scheme to determine whether a cause of action for damages is required by implication.

We do not accept plaintiffs' assertion. We are not at liberty to infer from the Agreements an intention on the part of the United States to subject itself to suit for money damages based on a violation of their provisions. We reiterate that, absent an unequivocal and express waiver of sovereign immunity, a suit for money damages against the United States may not be maintained in this Court. Since plaintiffs have not alerted the Court to "*specific language* in the Agreements waiving the sovereign immunity of the United States," we do not have jurisdiction of plaintiffs' suit. *Canadian Transport Co.*, 663 F.2d at 1092 (emphasis added).[4]

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[4] Plaintiffs place great reliance on *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980). In that case the Court found that Iran had waived its sovereign immunity by virtue of a provision in a treaty between it and the United States. That provision stated:

> No enterprise of either High Contracting Party . . . shall . . . claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Id. at 523, quoting Article XI, paragraph 4 of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran. Despite its reliance on *American Int'l Group*, plaintiffs have not brought forth any provision in the Agreements resembling the above-quoted provision. Without

Accordingly, it is this 1st day of March, 1984,

ORDERED that defendants' motion to dismiss plaintiffs' complaint be, and the same is hereby, GRANTED.

/s/ HOWARD F. CORCORAN
Judge

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similarly explicit language in the Agreements waiving the government's immunity to suit, *American Int'l Group* does not support plaintiffs' position.

Supreme Court, U.S.
FILED
SEP 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-163

In the Supreme Court of the United States

OCTOBER TERM, 1985

BALAIR, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-163

BALAIR, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are foreign air carriers that claim injury resulting from a Federal Aviation Administration regulation temporarily grounding certain aircraft. They seek damages from the United States, contending that an international treaty and bilateral aviation agreements between the United States and foreign governments impliedly waived the United States' sovereign immunity.

1. On May 25, 1979, an American Airlines DC-10 aircraft crashed shortly after take-off from Chicago's O'Hare International Airport, resulting in the death of all occupants. In response, on June 6, 1979, the Federal Aviation Administration (FAA) issued Special Federal Aviation Regulation No. 40 (SFAR-40), which prohibited the take-off or landing within the United States of all DC-10 aircraft, including those registered by foreign governments. The regulation remained in effect until July 13, 1979 (Pet. App. 3a-4a).

Petitioners are seven foreign airlines that were affected by SFAR-40. Prior to the rescission of the regulation, several of the petitioners challenged its legality in suits brought before the United States Court of Appeals for the District of Columbia Circuit. That court held that SFAR-40 violated the Convention on International Civil Aviation (the Chicago Convention), the relevant bilateral agreements, and Section 1102 of the Federal Aviation Act of 1958, 49 U.S.C. (1976 ed.) 1502. *British Caledonian Airways, Ltd.* v. *Bond*, 665 F.2d 1153 (D.C. Cir. 1981).

Petitioners then brought this action against the United States seeking damages in excess of $100,000,000 allegedly sustained as a result of SFAR-40 (Pet. App. 4a). The United States moved to dismiss the action on the ground that petitioners' claims were barred by sovereign immunity (*id.* at 5a). Petitioners responded that the Chicago Convention and the bilateral agreements impliedly waived the United States' sovereign immunity. The district court granted the United States' motion, holding that a waiver of sovereign immunity must be express and that petitioners had failed to identify any specific language in the international agreements that waived the United States' immunity (*id.* at 9a). The court of appeals affirmed without opinion (*id.* at 1a-2a).

2. Sovereign immunity principles are familiar and well established. As this Court has stated, " 'the United States, as sovereign, " 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." ' " *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). Thus, " 'this Court has long

decided that limitations and conditions upon which the Government consents to be sued must be strictly observed * * *.' " *Lehman*, 453 U.S. at 161, quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).[1]

Petitioners claim (Pet. 8-9) that the United States has waived its sovereign immunity through the Chicago Convention and other bilateral aviation agreements. However, they have failed to identify any provision of those international agreements that expressly waives the government's immunity from suit. Instead, they argue that a waiver should be inferred "even in the face of textual silence" (Pet. 10) on the basis of the factors articulated by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975). See Pet. 8-10.

Petitioners' reliance on *Cort* is completely misplaced. That decision considered whether a corporate stockholder could maintain a private cause of action against the corporation's directors, based on their alleged violation of a federal criminal statute. See 422 U.S. at 68. The *Cort* decision, dealing with implied causes of action against private parties, does not address the waiver of sovereign immunity. Indeed, the *Cort* standards for determining whether federal law creates an implied cause of action are facially inapplicable to determining whether the United States has waived

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[1]Contrary to petitioners' suggestion (Pet. 7 n.3), sovereign immunity poses a jurisdictional bar to a suit for damages. *Lehman*, 453 U.S. at 160. Petitioners are plainly wrong in maintaining that the grant of federal question jurisdiction, see 28 U.S.C. 1331, waives sovereign immunity. See, *e.g.*, *B. K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 724 (2d Cir. 1983). Similarly, the grant of district court jurisdiction over tort actions by aliens alleging violation of international law or United States treaties, see 28 U.S.C. 1350, does not constitute a waiver of immunity. See *Sanchez-Espinoza* v. *Reagan*, No. 83-1997 (D.C. Cir. Aug. 13, 1985), slip op. 8; *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). Instead, the necessary waiver must be found in a separate federal statute or treaty. See *United States* v. *Mitchell*, 445 U.S. at 538.

its sovereign immunity because a waiver of sovereign immunity " '*cannot be implied.*' " *Mitchell*, 445 U.S. at 538 (emphasis added). Nothing in *Cort*, or in subsequent cases interpreting *Cort*, alters the established rule that waivers of sovereign immunity must be express.

Petitioners' reliance on *Patentas* v. *United States*, 687 F.2d 707 (3d Cir. 1982), is likewise misplaced. In *Patentas*, the court of appeals rejected a claim for damages against the United States arising out of the explosion of a tanker that the Coast Guard had inspected pursuant to the Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.* The plaintiffs in that case apparently invoked the *Cort* standards to "imply" a cause of action against the government. The court, citing *Mitchell* and *Testan*, responded that "[t]he government is immune from suit unless Congress explicitly waives that immunity." 687 F.2d at 711. The court added that "*Mitchell* and *Testan* * * * do not suggest that this cardinal principle is modified in any way by *Cort* v. *Ash*." *Ibid.*

3. Petitioners urge that an implied waiver of sovereign immunity should be recognized in the present case to further "international comity" (Pet. 6). They assert that other nations have interpreted the international agreements to permit domestic suits for damages arising out of their violation (Pet. 6-7) and suggest that sovereign immunity principles simply reflect the "idiosyncracies" of American jurisprudence (Pet. 10).

This Court has consistently refused such invitations to "tamper with [sovereign immunity] principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." *Testan*, 424 U.S. at 400. It has long recognized that "where it is proper for the nation to furnish a remedy, Congress has

wisely reserved the matter for its own determination." *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 275-276 (1868). "In the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." *Canadian Transport Co.* v. *United States*, 663 F.2d at 1092. See *Head Money Cases*, 112 U.S. 580, 598 (1884).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985